

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARK THOMAS,)	CASE NO. CV 10-03630 AHM (RZ)
)	
Petitioner,)	MEMORANDUM AND ORDER:
)	(1) DENYING REQUEST FOR
v.)	EXTENSION OF TIME; and
)	(2) SUMMARILY DISMISSING
UNKNOWN,)	ACTION FOR LACK OF
)	JURISDICTION
Respondent.)	
_____)	

The Court will dismiss this matter for lack of subject matter jurisdiction.

This is the second time that the would-be Petitioner, Mark Thomas, has sought relief from this Court without actually commencing a “case or controversy” so as to provide the Court with subject matter jurisdiction. On January 19, 2010, Thomas filed a short request for appointment of counsel to assist him in preparing a habeas petition to be filed here. On January 28, the Court summarily dismissed that action, *Mark Edward Thomas v. People*, No. CV 10-0348 AHM (RZ), explaining as follows:

On January 19, 2010, the Court received a document from Mark Edward Thomas, a state prison inmate in Calipatria, requesting appointment of counsel, presumably to assist him in challenging a criminal conviction. Thomas has no currently-

1 pending action in this Court in which counsel could assist him,
2 however, and he has filed no actual petition or any other
3 documents so as to commence one. Because he has not properly
4 initiated a “case” or “controversy,” the Court lacks subject
5 matter jurisdiction.

6 Federal courts are limited in the exercise of their judicial
7 power to “cases” or “controversies.” U.S. CONST. art III, § 2.
8 A justiciable case or controversy does not include a dispute of
9 a hypothetical or abstract character. *Aetna Life Ins. Co. v.*
10 *Haworth*, 300 U.S. 227, 240, 57 S.Ct. 461, 81 L.Ed. 617 (1937).
11 The case must be definite and concrete. *Id.* That is, it must be
12 a real and substantial controversy admitting of specific relief
13 through a decree of a conclusive character. *Id.* at 241. Courts
14 do not sit to decide hypothetical issues or to give advisory
15 opinions. *Princeton Univ. v. Schmid*, 455 U.S. 100, 102, 102
16 S.Ct. 867, 70 L.Ed.2d 855 (1982).

17 In *Woodford v. Garceau*, 538 U.S. 202, 123 S.Ct. 1398,
18 155 L.Ed.2d 363 (2003), petitioner Garceau had been sentenced
19 to death for first-degree murder in California, and in 1993 the
20 California Supreme Court upheld his conviction and death
21 sentence. In May 1995, Garceau filed a motion for the
22 appointment of counsel and an application for stay of execution
23 in the Eastern District of California. The District Court granted
24 a temporary stay and, late in June of 1995, appointed counsel
25 for Garceau and extended the stay two further times. Garceau
26 filed his actual petition on July 2, 1996. *See id.* at 204-05.

27 The central issue in *Garceau* was whether the provisions
28 of the Antiterrorism and Effective Death Penalty Act of 1996

1 (“AEDPA”), 110 Stat. 1214, applied to Garceau’s habeas
2 claims. The high court previously held in *Lindh v. Murphy*, 521
3 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), that the
4 AEDPA amendments do not apply to cases that were “pending”
5 in federal court on April 24, 1996, the date on which AEDPA
6 became effective. On the one hand, Garceau had filed
7 documents in federal court *before* that date, namely his stay
8 application and his motion for appointment of counsel, both of
9 which the District Court granted. On the other hand, he did not
10 file his petition itself until *after* AEDPA’s effective date. The
11 District Court, applying the Ninth Circuit’s then-recent ruling
12 in *Calderon v. United States District Court (Kelly)*, 163 F. 3d
13 530, 540 (9th Cir. 1998) (en banc), held that pre-AEDPA law
14 governed, but that Garceau did not merit habeas relief anyway.
15 The Ninth Circuit agreed that pre-AEDPA law governed
16 pursuant to *Kelly* but reversed, holding that Garceau merited
17 relief under that law.

18 The Supreme Court reversed, explaining, in essence, that
19 no § 2254 habeas petition is “pending” – at least for *Lindh*
20 purposes – until it is filed, and that a pre-petition stay
21 application or motion to appoint counsel will not suffice. 538
22 U.S. at 206-207. In doing so, the high court distinguished
23 *McFarland v. Scott*, 512 U.S. 849, 114 S.Ct. 2568, 129 L.Ed.2d
24 666 (1994), which held that a death-row inmate’s motion for
25 appointment of counsel under 18 U.S.C. § 848(q)(4)(B)
26 conferred subject matter jurisdiction upon the district court to
27 grant the inmate’s concurrently-requested stay of execution
28 under 28 U.S.C. § 2251:

1 To begin with, *McFarland* involved the
2 interpretation of § 2251[,] [which authorizes stays
3 of state proceedings, including executions, prior to
4 final disposition of a pending habeas action], not
5 § 2254, which is at issue here. And, as the Courts
6 of Appeals have recognized . . . *McFarland* must
7 be understood in light of the Court's concern to
8 protect the right to counsel in 18 U.S.C.
9 § 848(q)(4)(B).

10 538 U.S. at 208-09.

11 Although its holding technically is limited to “purposes
12 of applying the rule announced in *Lindh*,” *id.*, *Garceau* strongly
13 suggests that no case or controversy arises, for Article III
14 jurisdiction purposes, upon the filing of a mere pre-petition stay
15 request – with the important exception of death-row inmates
16 who seek a pre-petition stay of execution and move for
17 appointment of counsel, as authorized by a particular statute, to
18 aid in petition preparation.

19 Here, would-be Petitioner Thomas apparently is not
20 facing execution, and he thus does not have the statutory right
21 to counsel enjoyed by petitioners condemned to death.
22 Accordingly, no action or proceeding is pending, and dismissal
23 is required. *See generally Ford v. Warden*, No. CV 08-4304
24 CAS (E), 2008 WL 2676842 (C.D. Cal. July 7, 2008) (collecting
25 cases).

26 The Court passes no judgment at this time on whether
27 Petitioner may merit appointment of counsel at some point.
28 The Court decides today only that it is currently without power
to grant him the relief he seeks because his request has not been
presented in the context of an existing case or controversy.

Rule 4 of the Rules Governing Section 2254 Cases in the
United States District Courts provides in part that “[i]f it plainly

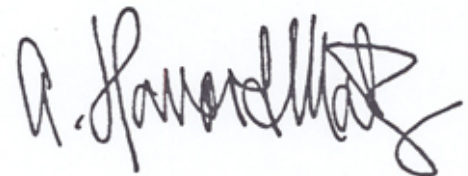
appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified.” Accordingly, the reference to the United States Magistrate Judge is withdrawn. Petitioner’s motion is DENIED and this matter is DISMISSED without prejudice for lack of jurisdiction.

Now before the Court is Thomas’s one-page request for an extension of time to commence a habeas action here, but again he includes no actual petition. The Court again lacks jurisdiction. Even before the Supreme Court’s *Garceau* decision, discussed in the excerpt, lower federal courts consistently denied the extension-of-time relief that Thomas seeks. In general, the courts have declined to toll a statute of limitations with respect to claims not yet filed. *See, e.g., United States v. Cook*, 795 F.2d 987, 994 (Fed. Cir. 1986). More specifically, the courts have refused to toll the one-year limitations period on habeas petitions and § 2255 motions prior to filing of the actual petition or motion in non-capital cases. *See, e.g., United States v. Leon*, 203 F.3d 162 (2d Cir. 2000).

Accordingly, the reference to the United States Magistrate Judge is withdrawn. Thomas’s request for an extension of time is DENIED and this matter is DISMISSED without prejudice for lack of jurisdiction.

IT IS SO ORDERED.

DATED: May 27, 2010



A. HOWARD MATZ
UNITED STATES DISTRICT JUDGE

JS-6

Presented by:


RALPH ZAREFSKY
UNITED STATES MAGISTRATE JUDGE